ARISE ENTERPRISE SDN BHD

v.

FEIYEN SANHERK HARDWARE SDN BHD

HIGH COURT MALAYA, JOHOR BAHRU
SYED AHMAD HELMY JC
[COMPANIES WINDING-UP PETITION NO: 28-195-2000(1)]
30 MAY 2001

COMPANY LAW: *Winding-up - Opposition to petition - Preliminary objection - Affidavit in support - Whether admissible - Whether in breach of r. 30 of the Companies (Winding-Up) Rules 1972*

COMPANY LAW: *Winding-up - Petition - Filing of affidavit in opposition - Principles laid down in Crocuses & Daffodils (M) Sdn Bhd v. Development & Commercial Bank Bhd - Whether applicable - Discretionary powers of court to validate formal defects or irregularities - Sections 221(2)(b) of the Companies Act 1965 - Rule 194 of the Companies (Winding-Up) Rules 1972*

COMPANY LAW: *Winding-up - Petition - Whether action showed bona fide dispute as to debt - Whether valid subsisting claim between parties - Whether debt due and payable - Ground for refusal*

The respondent herein raised a preliminary objection at the hearing of the petitioner's petition for the winding-up of the respondent pursuant to the respondent's failure to pay the petitioner a debt under a default judgment obtained against the respondent. The preliminary objection raised a question of law on whether the default judgment which was replaced by a consent judgment can form the basis of this petition.

The petitioner relied on the decision in *Crocuses & Daffodils (M) Sdn Bhd v. Development & Commercial Bank Bhd ('Crocuses')* in objection to the admissibility of the affidavit exhibiting the consent judgment, arguing that it was in breach of r. 30 of the Companies (Winding-Up) Rules 1972 (the "Rules") which provides for the time frame for the filing of affidavits in opposition to a petition.

Held:

[1] Although bound by the mandatory time frame for the filing of affidavits in opposition as laid down by *Crocuses*, nevertheless the court is not restricted by that case not to exercise its discretionary powers as conferred by s. 221(2)(b) of the Companies Act 1965 and r. 194 of the Rules which empowers the court to validate formal defects or irregularities. (p 16 b-c)

[1b] The delay in filing out of the time frame as prescribed by r. 30 of the Rules is an irregularity which does not cause any injustice to the petitioner and thus, it followed accordingly that the said affidavit was allowed. (p 16 d-e)

[2] The terms of the consent judgment displaced any outstanding debt and by reason thereof, a *bona fide* dispute was established. Since the very essence of the petitioner's petition in the form of default judgment had been completely abrogated by the consent judgment, thus any claim between them was put to an end. Subsequently, there was no debt due and payable for the petition to survive. (p 17 d-f)

[Petition dismissed with costs.]

Case(s) referred to:
Arab Malaysian Merchant Bank v. Orient Apparel Bhd [1999] 2 CLJ 647 ***(foll)***
Crocuses & Daffodils (M) Sdn Bhd v. Development & Commercial Bank Bhd [1997] 3 CLJ 485 ***(dist)***
Mann & Anor v. Goldstein & Anor [1968] 2 All ER 769 ***(refd)***
Re Peoples Parkway Development Pte Ltd [1992] 1 CLJ 314; [1992] 4 CLJ (Rep) 469 ***(refd)***
Re Union Accident Insurance Co Ltd [1972] 1 All ER 1105 ***(not foll)***

Legislation referred to:
Companies Act 1965, ss. 218(1)(e), (i), (2)(a), (b), (c), 221(2)(b), 222, 223, 224, 225, 226
Companies (Winding-Up) Rules 1972, rr. 30(1), 33, 194(1)

Other source(s) referred to:
Pennington's Company Law, 1985, 5th edn, p 843

For the petition - Ong Ban Chai (KP Ng); M/s Ong Ban Chai & Co
For the respondent - TS Chang; M/s Henry Soong & Chang

Reported by Raja Vishnu Sivarajah

JUDGMENT

Syed Ahmad Helmy JC:

The petitioner herein in encl. 2 petitioned for the winding-up of the respondent under s. 218(1)(e) and s. 218(1)(i) read with s. 218(2)(b) and (c) of the Companies Act 1965 on the following grounds: (i) the respondent had failed to pay the petitioner a sum of RM24,955 and interest thereon under default judgment dated 31 May 2000 obtained in Pontian Magistrate's Court Summons No. 72-61-2000 as demanded under the notice dated 30 June 2000; (ii) the respondent was insolvent and unable to pay its debts; and (iii) it was just and equitable that the respondent be wound-up. The

petitioners also alluded to another default judgment for RM563,414.49 dated 21 October 1999 *vide* Johor Bahru High Court Suit No. 22-39-1999 obtained by United Merchant Finance Bhd in support of its contention that the respondent company was positively insolvent.

The respondent filed in a notice of intention to appear on 8 December 2000 to oppose the petition. The petition just came up for hearing on 3 January 2001 in the presence of Mr. Ong Ban Chai learned counsel for the petitioner.

Mr. T.S. Chang learned counsel appeared for the respondent and Puan Azizah appeared on behalf of the official assignee. Petitioner's counsel informed the court that the papers are not in order as the petition has not been gazetted and the court accordingly fixed 23 February 2001 as the next hearing date.

On 23 February 2001 when the matter came up for hearing the parties informed the court that all relevant affidavits have been filed and the court accordingly fixed 6 April 2001 as the date for hearing of the petition.

At the hearing on 6 April 2001 counsel for the respondent raised a preliminary objection on the issue on whether the default judgment which has been replaced by a consent judgment can form the basis of this petition. He referred to the affidavit of Thew Say Guan affirmed on 21 February 2001 where a draft copy of the consent judgment was exhibited. Learned counsel for the petitioner objected to the admissibility of the affidavit dated 21 February 2001 of Thew Say Guan which exhibited the consent judgment on the ground that it is in breach of r. 30 of the Companies Winding-Up Rules 1972 and ought to be excluded and relied on the Court of Appeal decision in *Crocuses & Daffodils (M) Sdn Bhd v. Development & Commercial Bank Bhd* [1997] 3 CLJ 485 (hereinafter called *"Crocuses"*).

Rule 30 of the Companies (Winding-Up) Rules 1972 which provides for the time frame for the filing of affidavits in opposition and affidavits in reply reads as follows:

> 30(1) Affidavits in opposition to a petition that a company may be wound up shall be filed and a copy thereof served on the petitioner or his solicitor at least seven days before the time appointed for the hearing of the petition.
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> (2) Any affidavit in reply to an affidavit filed in opposition to petition (including a further affidavit in support of any of the facts alleged in the petition) shall be filed within three days of the date of service on the petitioner of the affidavit in opposition and a copy of the affidavit in reply shall be forthwith served on the opposing petitioner or his solicitor.

The Court of Appeal in *Crocuses* clearly held that r. 30(1) of the Companies (Winding-Up) Rules 1972 are mandatory in nature and as such the time frame must be strictly construed.

I have had the opportunity of scrutinising the *Crocuses* judgment and note that the judgment did not touch on the discretionary powers conferred to the court by s. 221(2)(b) of the Companies Act 1965 and r. 194 of the Companies (Winding-Up) Rules 1972 which empowers the court to validate formal defects or irregularities. Though I subscribe and am bound by the mandatory time frame for the filing of affidavits in opposition as laid down by *Crocuses* nevertheless I am not restricted by that case not to exercise the discretionary powers as conferred by s. 221(2)(b) Companies Act 1965 and r. 194 of the Companies (Winding-Up) Rules 1972.

In the exercise of the powers conferred by s. 221(2)(b) of the Companies Act 1965 and r. 194 of the Companies (Winding-Up) Rules 1972 I hold that the delay in filing out of the time frame as prescribed by r. 30 is an irregularity which does not cause any injustice to the petitioner more so in the light of the explanation for the delay given by the respondent that his solicitors only received the court approved draft copy of judgment on 21 February 2001. In this regard I ascribe to the sentiments expressed in *Arab Malaysian Merchant Bank v. Orient Apparel Berhad* [1999] 2 CLJ 647 at p. 653 where the learned judge held "having read *Crocuses* carefully it would appear to me that all the Court of Appeal had ruled in that case was that r. 30 was mandatory in nature. It did not however consider the power of the court to condone the irregularity under r. 194(1) of the Companies (Winding-Up) Rules 1972 which provides that no proceedings under the Act or the Rules shall be invalidated by any formal defect or any irregularity unless the court is of the opinion that substantial injustice has been caused by the defect or irregularities and that the unjustice cannot be remedied by any order of the court. It follows therefore the Court of Appeal's decision in *Crocuses* must be construed to apply only to the factual pecularity of that case." In the circumstances I accordingly allow the admissibility of the affidavit of Thew Say Guan dated 21 February 2001.

It is also pertinent to allude to the irony of the petitioners objection when they themselves are relying on the consent judgment as exhibited in Thew Say Guan's affidavit aforesaid in support of their contention that the consent judgment is an admission of debt.

The question thus arise what is the effect of the consent judgment on the petitioner's petition herein.

The effect of the consent judgment is that whilst the parties *inter se* agree that there is an outstanding amount owing between the parties nevertheless the person to whom the debt is owed agrees to a suspension of the right to enforce the amount so long as the terms thereof are adhered to. So long as the terms are adhered to there cannot be said to be a present debt due and payable and by extension thereof the respondent cannot be said to be a debtor or the petitioner a creditor bearing in mind that a creditor is a person who could enforce his claim against a company by an action of debt – *Pennington's Company Law* (1985) 5th edn, p. 843. As was stated in *Mann & Anor v. Goldstein & Anor* [1968] 2 All ER 769 – if a petitioner is not a creditor, it is not entitled to present a petition or apply for a winding-up order. It has no *locus standi* and the petition must fail. In point of fact learned counsel for the petitioner in his submission acknowledged that so long as the terms of the consent judgment are not breached no petition can be instituted.

In the absence of any evidence to the contrary the terms of the consent judgment clearly displaces any present outstanding debt and by reason thereof a *bona fide* dispute is established. I wish to add that since the petitioner's claim is founded on the presumption of inability to pay under s. 218(2)(a) of the Companies Act 1965 it has to establish that there is a debt presently due and payable before the presumption can operate. The presumption cannot be availed of by a contingent and/or prospective creditor because of the words "then due" appearing therein.

Upon evaluating the evidence before me and particularly the terms of the consent judgment it clearly justifies my conclusion that the very essence of the petitioner's petition in the form of the default judgment has been completely abrogated by the consent judgment and thus any claims between them is put to an end. Since the claims is put to an end there cannot be said to be a debt presently due and payable for the petition to survive.

I shall now address the issue of the petitioner's submission that irrespective of the judgment debt the respondent company is hopelessly insolvent and he purports to rely on the two affidavits of Thew Say Peng, a supporting creditor, affirmed on 9 November 2000 and 3 April 2001.

I enquired from learned counsel as to whether the affidavits of the supporting creditor as aforesaid are admissible. Counsel concede that there are no express provisions under the Companies Act which says that a supporting creditor can or cannot file an affidavit but argued that the combined provisions of ss. 222 to 226 of the Companies Act enables a supporting creditor to file in an affidavit without leave.

I have carefully perused the provisions of ss. 222 to 226 Companies Act 1965 and no where does it state expressly or impliedly that a supporting creditor can file an affidavit with or without leave.

In point of fact a more relevant provision regulating the filing of affidavits is r. 30 of the Companies (Winding-Up) Rules 1972 which has been transcribed in the earlier part of my judgment herein.

Upon scrutinising the provisions of r. 30 one cannot help but emphasise the manner in which the said rule is positively framed in that it provides for the filing of the affidavits by two categories of persons namely the petitioner and the respondent. It is silent as to the other categories of persons who can affirm affidavit.

It is my judgment that in the absence of provisions in the Companies Act 1965 and Rules 1972 permitting the filing by a supporting creditor of an affidavit, a supporting creditor cannot file in an affidavit much less without leave and in the instant case no leave was applied for.

Though under r. 33 Companies (Winding-Up) Rules 1972 a supporting creditor can be substituted in place of the petitioner nevertheless a formal application has to be made – see *Re Peoples Parkway Development Pte Ltd* [1992] 1 CLJ 314; [1992] 4 CLJ (Rep) 469. Pending the approval of the court in relation to the application for substitution the supporting creditor are not parties to the action. Hence by extension only upon being made a party as such by substitution would the supporting creditor be permitted to adduce evidence of insolvency.

In the absence of such an order for substitution to assume mantle of petition and/or statutory provision I rule that the affidavits of Thew Say Peng filed herein cannot be admissible and hence are excluded.

It is also pertinent to note that United Merchant Finance Bhd though allegedly has obtained judgment in default against respondent was conspicuously missing as a supporting creditor and has not indicated whether they support or oppose petition.

The cumulative effect of the exclusion of the affidavits of Thew Say Peng and the failure of United Merchant Finance Bhd to file in the notice of intention to attend hearing of the petition leads me to hold that there is no supporting evidence of the petitioner's contention that the respondent are insolvent and unless and until the onus has been discharged by the petitioner the respondent is under no duty to prove otherwise. Thus the

requirement as laid down by *Re Union Accident Insurance Co. Ltd* [1972] 1 All ER 1105 in that a respondent who disputes the debt must produce audited account does not arise as the petitioner has failed to discharge its onus of adducing positive evidence of insolvency.

In the light of the aforesaid I accordingly dismissed the petition herein with costs.